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IN THE

# Supreme Court of the United States

CARMELO JOSE RODRIGUEZ,

*Petitioner*,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Kerry W. Bretz
Jules E. Coven
Alan Michael Strauss
BRETZ & COVEN
305 Broadway
Suite 100
New York, New York 10007
(212) 267-2555

Lucas Guttentag
*Counsel of Record*
Lee Gelernt
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
125 Broad Street
New York, New York 10004
(212) 549-2621

*Attorneys for Petitioner*

32pp

## QUESTIONS PRESENTED

The Board of Immigration Appeals issued a final order of removal finding that Petitioner, a legal permanent resident of the United States, was deportable on the basis of his criminal convictions and that he was barred from applying for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994) by a recent amendment to the Immigration and Nationality Act (INA). Petitioner filed a petition for review in the court of appeals seeking judicial review of the Board's ruling on the ground that the amendment did not apply retroactively to his case and that, if applicable, it would violate due process and equal protection. The court of appeals dismissed all of Petitioner's claims for lack of jurisdiction under 8 U.S.C. 1252(a)(2)(C), one of the *permanent* judicial review amendments to the INA enacted by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The questions presented are:

1. Whether the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the court of appeals' petition-for-review jurisdiction over Petitioner's constitutional and statutory claims regarding his eligibility to apply for a waiver of deportation under former 8 U.S.C. 1182(c) (1994), and if so, whether IIRIRA leaves open any other avenue of jurisdiction for Petitioner to obtain review of his claims?

2. If IIRIRA completely precludes review of either Petitioner's constitutional or statutory claims, does it violate the Suspension of Habeas Corpus Clause, Article III, or the Due Process Clause of the Fifth Amendment?

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## PETITION FOR A WRIT OF CERTIORARI

Carmelo Jose Rodriguez respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a)[1] is reported at 206 F.3d 308 (3d Cir. 2000). The order of the court of appeals denying rehearing and rehearing *en banc* is unreported (Pet. App. 43a). The decision and order of the immigration judge (Pet. App. 37a), and the decision of the Board of Immigration Appeals (Pet. App. 40a), are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 9, 2000. Pet. App. 34a. A petition for rehearing and rehearing *en banc* was denied on June 9, 2000. Pet. App. 43a. On August 29, 2000, Justice Souter extended the time within which to file a petition for a writ of *certiorari* to and including October 7, 2000. On September 27, 2000, Justice Souter further extended the time within which to file a petition for a writ of *certiorari* to and including November 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition (Pet. App. 61a-70a) are pertinent portions of the Suspension of

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[1] "Pet. App." refers to the separately bound appendix to this petition.

Habeas Corpus Clause of the Constitution, U.S. Const., Art. I, § 9, cl. 2; the Due Process Clause of the Fifth Amendment; Article III of the United States Constitution; 8 U.S.C. 1182(c), as in effect before and after April 24, 1996; 8 U.S.C. 1252(a)(1), (a)(2)(C), and (b)(9) (1999); Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546; and 28 U.S.C. 2241.

## STATEMENT

This case raises questions concerning the right of longtime legal permanent resident immigrants to obtain judicial review of a final order of removal in light of the *permanent* jurisdictional amendments to the Immigration and Nationality Act (INA) enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546. The Petitioner asserts that IIRIRA does not preclude review of his challenge to his final removal order, and that if it does preclude review of his claims, it violates the Suspension Clause, Article III and due process. The government contends that Congress has and constitutionally may dictate that *no* court may hear his challenge because of the nature of the claims. The courts of appeals are divided on the jurisdiction of the federal courts to hear the types of claims that Petitioner presents.

More specifically, the jurisdictional issue raised in this case is whether immigrants with certain criminal convictions may judicially challenge the Board of Immigration Appeals' ruling that they are statutorily ineligible to apply for a discretionary waiver of deportation. That issue raises the questions (1) whether the proper *forum* to raise this type of challenge is in the

court of appeals by means of a petition for review or in the district court by means of a habeas corpus action, and (2) whether irrespective of the forum for review, the *scope* of jurisdiction is limited to reviewing only substantial constitutional claims, so that all non-constitutional errors (including errors of statutory construction, such as the statutory retroactivity claim advanced by Petitioner in this case) are wholly unreviewable.

Petitioner's position is that review over both his statutory and constitutional claims must be available in *some* court by some means, either a district court habeas corpus action or a petition for review in the court of appeals, and that the absence of review in any court renders IIRIRA's amendments unconstitutional. The government's position is that there is no habeas jurisdiction in the district courts over the types of challenges brought by Petitioner, that the courts of appeals have exclusive jurisdiction over such challenges, and that the scope of review in the court of appeals is limited to correcting "substantial constitutional" errors.

The court of appeals in this case disagreed with the government's contentions. It held that the proper forum for review of Petitioner's claims is a district court habeas corpus action under 28 U.S.C. 2241 and that the scope of review includes both constitutional and statutory challenges to the denial of a waiver of deportation. Accordingly, the court dismissed the petition for review for lack of jurisdiction and instructed petitioner to pursue his claims in a district court habeas action. Because Petitioner's jurisdictional position is that his constitutional and statutory claims must be reviewable in some court, he does not object to the court of appeals' ruling that he must pursue his claims in district court rather than by petition for review in the court of appeals.

However, Petitioner recognizes that the circuits are divided on the jurisdictional question in this case and that the Court may decide to grant review in a habeas corpus case to resolve the circuit split. In the event the Court grants review in a habeas case, Petitioner respectfully urges the Court to grant review in this case as well to ensure that the Court will have a complete vehicle for addressing the jurisdictional questions raised by the IIRIRA amendments.

As set forth more fully below, the circuit courts have overwhelmingly agreed that the proper interpretation and constitutionality of the recent jurisdictional amendments to the INA hinge critically on the interplay between petition-for-review and habeas corpus jurisdiction and the extent to which at least one of those avenues remains available to review the types of claims that Petitioner presents. If constitutionally adequate review is available in the court of appeals by petition for review, then access to habeas review is not necessary. Similarly, if constitutionally adequate review is available in the district court, then the lack of jurisdiction in the court of appeals by petition for review is unproblematic. However, a profound constitutional issue would arise if the Court were to conclude that IIRIRA's amendments preclude both avenues of jurisdiction over either constitutional or statutory challenges. Before reaching a constitutional question of such magnitude, the Court should first determine whether IIRIRA has repealed review in *both* the district court and the court of appeals. Accordingly, *if* the Court determines that plenary review is warranted, it should grant *certiorari* in this petition-for-review case as well as in a habeas corpus case originating in the district court.

### *A. Introduction*

IIRIRA was enacted on September 30, 1996, and substantially revised both the substantive and jurisdictional

provisions of the INA. The jurisdictional amendments of IIRIRA that are at issue here are the *permanent* provisions codified at 8 U.S.C. 1252 *et seq.*, INA § 242 *et seq.* They apply to all cases in which the administrative immigration "removal" proceedings commenced on or after April 1, 1997. IIRIRA § 309(a), 110 Stat. 3009-625.[2]

Petitioner is a longtime, lawful permanent resident of the United States who is subject to a final order of removal (formerly called an order of deportation). The Board of Immigration Appeals (BIA or Board) determined that Petitioner was deportable based on his criminal convictions and further held that a substantive amendment enacted by IIRIRA rendered him ineligible to apply for a discretionary waiver of deportation. Petitioner sought review by filing a petition for review with the court of appeals pursuant to 8 U.S.C. 1252(a)(1), which provides a general grant of jurisdiction to the courts of appeals to review challenges to final orders of removal by means of a petition for review. Petitioner did not contest the BIA's determination of deportability but challenged on statutory and constitutional grounds the BIA's determination that IIRIRA's amendments rendered him ineligible to apply for a waiver of deportation under former 8 U.S.C. 1182(c), INA § 212(c) (1994) (granting Attorney General discretionary authority to waive deportation of longtime lawful permanent residents who satisfy statutory eligibility criteria). Petitioner's principal contention is a statutory retroactivity claim—that the BIA misinterpreted the temporal reach of the substantive

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[2] As discussed more fully below, Congress in 1996 enacted two other sets of jurisdictional amendments to the INA. The first set was enacted on April 24, 1996, as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. The second was the *transitional* rules enacted by IIRIRA. *See* IIRIRA § 309(c), 110 Stat. 3009-626. Those provisions are not directly at issue but have substantially shaped the courts of appeals' interpretation of the permanent IIRIRA amendments.

amendments restricting or eliminating eligibility for Section 212(c) relief and that Congress did not intend those amendments to apply retroactively to cases where, as here, the alien's criminal conduct and conviction triggering deportation occurred before passage of the amendments.

The court of appeals dismissed the petition for review for lack of jurisdiction in light of 8 U.S.C. 1252(a)(2)(C), a provision added to the INA by IIRIRA's permanent jurisdictional amendments. That provision provides: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [various sections of the INA]." The court of appeals further held that Petitioner's constitutional and statutory claims *were* reviewable in a district court habeas action under 28 U.S.C. 2241 (the general federal habeas corpus statute) because IIRIRA's amendments did not eliminate that grant of jurisdiction. The court of appeals did not reach the merits of Petitioner's statutory or constitutional claims.

The government took the position in the court of appeals that Congress has eliminated district court habeas jurisdiction over final removal orders and placed all review of such orders exclusively in the court of appeals by petition for review. The government further contended that 8 U.S.C. 1252(a)(2)(C) severely restricted the *scope* of review in the court of appeals in cases where, as here, the alien is deportable on the basis of certain criminal convictions. Specifically, the government took the position (1) that review in the court of appeals of the denial of a discretionary waiver is limited to "substantial constitutional" claims, (2) that *non*-constitutional claims challenging the denial of a waiver cannot be heard in *any* court (district court or the court of appeals), and (3) that the complete elimination of a judicial forum for Peti-

tioner's statutory retroactivity claim raises no constitutional concerns. Finally, the government argued that the particular constitutional claims asserted by Petitioner were *insubstantial* and should therefore be dismissed for lack of jurisdiction on that ground.

Petitioner took the position that review over *both* his constitutional and statutory claims remained available and that IIRIRA would violate the Constitution if it did not permit review in *some* court over both his claims. Petitioner maintained that Congress was constitutionally free to authorize review either by petition for review in the court of appeals or by habeas corpus in district court. However, Petitioner contended that in light of prior Third Circuit precedent construing the structurally similar jurisdictional amendments made by AEDPA and IIRIRA's transitional rules, the proper mechanism for review of his claims was, as a matter of statutory construction, in the district court by means of a habeas corpus action under 28 U.S.C. 2241.

The court of appeals noted that Petitioner was deportable on the basis of a criminal offense enumerated in 8 U.S.C. 1252(a)(2)(C) and held that Section 1252(a)(2)(C) repealed its own petition-for-review jurisdiction over Petitioner's statutory and constitutional claims. The court also held, however, that Petitioner could bring his claims in a district court habeas action because no provision of IIRIRA expressly repealed 28 U.S.C. 2241. The court further held that the scope of review in a Section 2241 habeas action included both constitutional and statutory claims. Accordingly, it dismissed the petition for review and instructed Petitioner to pursue his constitutional and statutory claims in a district court habeas action (which Petitioner had already filed).[3]

[3] Mr. Rodriguez's habeas action is now before the Third Circuit on appeal of the district court's ruling in favor of the government on the *merits*.

Because the court of appeals found that the district court remained available to review Petitioner's constitutional and statutory claims, it held that the elimination of its own jurisdiction over petitions for review did not raise the "serious constitutional problems" that would have been triggered had no forum been available to raise pure questions of constitutional and statutory law challenging the denial of a waiver of deportation. Pet. App. 28a. The court stressed that absent an alternative avenue of review, it could not have dismissed the petition for review without first addressing whether Petitioner's constitutional or statutory claims could be completely insulated from judicial review in any court by any means. *Id.*

The government sought rehearing and rehearing *en banc*, requesting that the court of appeals hold that habeas jurisdiction was unavailable to challenge a final order of removal, that the courts of appeals retained jurisdiction over substantial constitutional claims (but no other claims), and that Petitioner had presented no substantial constitutional claims. The government thus agreed with the result reached in the original decision (dismissal of all of Petitioner's claims), but not the grounds for dismissal. The court of appeals denied rehearing, leaving Petitioner without review in the court of appeals but with habeas jurisdiction as an alternative forum to pursue both his constitutional and statutory claims.

Because the court of appeals preserved habeas jurisdiction over Petitioner's constitutional and statutory claims, he does not object to the dismissal of his petition for review. However, *if* the Court concludes that review is warranted to resolve the circuit conflict on the availability of habeas review over challenges such as Petitioner's, he respectfully urges the Court to grant *certiorari* in both this "petition for review" case and in a habeas

case originating in district court to insure that the Court is presented with the complete procedural vehicle for resolving the jurisdictional issue.

As the court of appeals properly recognized, the interpretation and constitutionality of IIRIRA's amendments turn on whether the courts of appeals' own jurisdiction has been repealed, and if so, the extent to which some other mechanism (such as habeas corpus review) remains available to review claims such as Petitioner's. If no forum is available, then this Court would have to reach the constitutional questions raised by a complete preclusion of review over Petitioner's statutory or constitutional claims. That constitutional question has far-reaching implications and should be confronted only if this Court determines that IIRIRA's jurisdictional amendments have eliminated review *both* in the courts of appeals by petition for review and in the district courts by habeas corpus. Granting review in both a habeas action and a petition for review case will provide the Court with the necessary vehicle to make that determination.

In addition, if the Court concludes that plenary review is warranted, Petitioner respectfully suggests that the petition for review in this case is a particularly appropriate vehicle to address the disagreement among the circuits for several reasons. First, Petitioner is challenging whether the BIA erred in holding that IIRIRA repealed his eligibility to apply for a waiver of deportation. This case does *not* challenge the BIA's threshold finding of deportability. The distinction between those two types of challenges is critical because there is no circuit split over the courts' jurisdiction to hear challenges to whether the BIA properly found an alien deportable in cases governed by Section 1252(a)(2)(C). The courts of appeals have held that the statute does not affect their petition-for-review jurisdiction over such a challenge to

hear both constitutional and non-constitutional claims (and the government agrees).

Second, Petitioner in this case raised both a constitutional *and* a statutory challenge to the BIA's finding that he was ineligible for a waiver of deportation. Accordingly, this case squarely presents the Court with a vehicle for resolving whether aliens with certain criminal convictions may raise only "substantial constitutional" claims challenging the denial of a waiver of deportation (as the government contends) or may also raise pure questions of statutory law.[4]

### *B. Statutory Framework*

The jurisdictional issue presented by this case initially arose under two prior sets of amendments to the INA. The first set was enacted by AEDPA and went into effect on April 24, 1996; the second involved the "transitional" judicial review rules of IIRIRA. The decisions from the courts of appeals construing those prior jurisdictional amendments have had a significant impact on the manner in which the circuits have interpreted the permanent jurisdictional amendments at issue here.

#### 1. *AEDPA and IIRIRA's Transitional Amendments*

Historically, deportation orders were reviewable in district court, primarily through habeas corpus, and for a brief period, through both habeas and APA declaratory actions. *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955). In 1961, Congress amended the INA and created

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[4] Moreover, the specific statutory claim raised by Petitioner in this case—whether the substantive IIRIRA amendments *retroactively* repealed eligibility for Section 212(c) waivers of deportation for aliens with aggravated felony convictions—is the statutory question that is affecting the greatest number of aliens and generating the most jurisdictional confusion.

a new judicial review scheme, formerly codified at 8 U.S.C. 1105a *et seq.* (1994), INA § 106 *et seq.*

The 1961 amendments gave the courts of appeals "sole and exclusive" jurisdiction to review final deportation orders by means of a petition for review. *See* former 8 U.S.C. 1105a(a) (1994), INA § 106(a); *Foti v. INS*, 375 U.S. 217, 221 (1963). The 1961 amendments also added a specific provision to the INA, however, which expressly provided for habeas review of deportation orders, although there was confusion regarding precisely when aliens could invoke such jurisdiction given that the INA simultaneously vested the courts of appeals with "sole and exclusive" jurisdiction over final deportation orders. *See, e.g., Nakaranurack v. INS*, 68 F.3d 290, 293 (9th Cir. 1995); *United States ex rel. Marcello v. INS*, 634 F.2d. 964, 969 (5th Cir. 1981).

AEDPA was enacted on April 24, 1996, and contained two relevant changes to the judicial review scheme created in 1961.[5] First, in Subtitle A of Title IV, AEDPA § 401(e) repealed the specific habeas provision in 8 U.S.C. 1105a(a)(10). 110 Stat. 1268. Second, in Subtitle B, AEDPA § 440(a) amended former 8 U.S.C. 1105a(a)(10) to provide that a final order of deportation entered against immigrants deportable on the basis of certain enumerated criminal grounds "shall not be subject to review by any court." 110 Stat. 1276-1277. AEDPA's amendments did not mention 28 U.S.C. 2241.

IIRIRA became law four months later and enacted additional changes to judicial review, including both transitional and permanent jurisdictional rules. The transitional rules applied to immigration proceedings commenced before April 1, 1997, in which the deportation

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[5] AEDPA's jurisdictional provisions went into effect immediately and applied to all pending cases. *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996).

order became final on or after October 31, 1996. IIRIRA § 309(a). Like AEDPA, IIRIRA's transitional amendments contained a provision that restricted review in cases involving aliens deportable on the basis of certain criminal offenses. That provision, IIRIRA § 309(c)(4)(G), provided that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections]." 110 Stat. 3009-626. IIRIRA's transitional rules, like AEDPA's amendments, did not mention Section 2241 habeas jurisdiction.

In light of the AEDPA/IIRIRA transitional amendments, two basic jurisdictional questions arose. The first was whether the jurisdictional bars in AEDPA § 440(a) and IIRIRA § 309(c)(4)(G) barred review in the courts of appeals where aliens contended that they were not deportable on the basis of one of the criminal offenses enumerated in those provisions. On that question, no significant disagreement emerged. The courts reasoned (and the government agreed) that the jurisdictional bar in AEDPA § 440(a) and IIRIRA § 309(c)(4)(G) is triggered, by its terms, only where the alien "*is* deportable" (emphasis added), and not where the BIA deems the alien deportable on the basis of one of the enumerated offenses. *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997). Accordingly, the courts of appeals held that they did not lose jurisdiction until *they* determined that the alien was deportable on the basis of one of the enumerated offenses, *i.e.*, they had "jurisdiction to determine their own jurisdiction." *Lettman v. INS*, 168 F.3d 463, 465 (11th Cir. 1999). *See also Hall v. INS*, 167 F.3d 852, 855 (4th Cir. 1999); *Okoro v. INS*, 125 F.3d 920, 925 n.10 (5th Cir. 1997). ***But see Berehe v. INS***, 114 F.3d 159, 161-62 (10th Cir. 1997).

The second jurisdictional question that arose under AEDPA and IIRIRA's transitional rules produced substantial litigation, and ultimately a 10-1 division in the courts of appeals. That question was whether aliens who were deportable on the basis of a criminal offense enumerated in AEDPA § 440(a) or IIRIRA § 309(c)(4)(G) could obtain judicial review of the BIA's determination that they were statutorily ineligible to apply for a waiver of deportation.

The courts of appeals overwhelmingly held that the proper forum to challenge a denial of a waiver of deportation was in a district court habeas action and that the scope of review included, at a minimum, constitutional and statutory claims. *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) ("*Magana II*"); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999).

These courts concluded that the jurisdictional bars repealed their own petition-for-review jurisdiction over challenges to the denial of a waiver of deportation, including to review substantial constitutional claims, but held that nothing in AEDPA or IIRIRA's transitional rules precluded district court habeas jurisdiction over such challenges under 28 U.S.C. 2241. Applying this Court's decision in *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996), which declined to find a repeal "by implication" of the Court's original habeas jurisdiction under Section 2241, the circuits held that the absence of an

express statement repealing Section 2241 meant that such jurisdiction remained available to review certain aspects of a deportation order that could not be challenged by a petition for review. The courts of appeals further held that the scope of habeas review was not limited to reviewing substantial constitutional claims but included review of at least certain non-constitutional *legal* claims (such as pure questions of statutory interpretation) because historically non-constitutional legal claims were reviewable in immigration habeas actions and the plain terms of Section 2241 authorized jurisdiction over violations of the "Constitution or treaties or *laws* of the United States." *See* Section 2241(c)(3) (emphasis added); *see also* Section 2241(c)(1).[6]

The government sought review in this Court regarding the proper forum and scope of judicial review to challenge the denial of a waiver of deportation in the first three decisions adverse to its jurisdictional position (the First Circuit's decision in *Goncalves*; the Second Circuit's decision in *Henderson/Navas*; and the Ninth Circuit's decision in *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir 1998)). The Court denied the petitions in *Goncalves* and *Henderson/Navas*, and remanded the

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[6] The lone dissenting Circuit was the Seventh, but even it disagreed only in part with the majority approach. *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000). *LaGuerre* held that habeas jurisdiction was not available to challenge a final deportation order and that all review must be sought in the court of appeals by means of a petition for review. However, *LaGuerre* expressed skepticism (but ultimately did not rule) on the government's position that the *scope* of review was limited to constitutional challenges and that Congress had intended to foreclose all review of statutory claims challenging the denial of a waiver of deportation, including the statutory retroactivity claim at issue in that case: "It seems unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect." 164 F.3d at 1041.

Ninth Circuit's decision in *Magana-Pizano* for further consideration in light of the Court's intervening decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*). *See Reno v. Goncalves*, 526 U.S. 1004 (1999) (denying *certiorari*); *Reno v. Navas*, 526 U.S. 1004 (1999) (same); *INS v. Magana-Pizano*, 526 U.S. 1001 (1999), *vacating*, 152 F.3d 1213 (9th Cir. 1998).[7]

### 2. *IIRIRA's Permanent Jurisdictional Amendments*

The permanent IIRIRA amendments repealed the prior judicial review scheme (*i.e.*, the 1961 scheme as amended by AEDPA and IIRIRA's transitional rules) and substituted a new statute, codified at 8 U.S.C. 1252 *et seq.*, INA § 242 *et seq.* Although the relevant permanent amendments are worded differently, the basic structure of the new provisions is the same. IIRIRA contains provisions vesting the courts of appeals with sole jurisdiction to review removal orders by petition for review (*see* 8 U.S.C. 1252(a)(1); 1252(b)(9)) and, as noted, includes a provision restricting review for aliens removable on the basis of specified criminal offenses, codified at 8 U.S.C. 1252(a)(2)(C). Like the prior sets of amendments, the permanent IIRIRA amendments also do not mention Section 2241 habeas jurisdiction.

As with the prior amendments, two jurisdictional issues have arisen, *i.e.*, the availability of judicial review

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[7] Unlike the decisions in the other circuits, the Ninth Circuit rested its decision on constitutional grounds because it found that Section 2241 had been repealed by one of IIRIRA's provisions, 8 U.S.C. 1252(g). The reach of that provision was significantly narrowed in *AADC*, 525 U.S. at 482, and on remand the Ninth Circuit joined nine other circuits in concluding that the amendments made by AEDPA and IIRIRA's transitional provisions did not repeal Section 2241, thereby obviating the need for a constitutional ruling. *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) (*Magana-Pizano II*).

over challenges to the initial finding of deportability and the availability of judicial review over challenges to the denial of a waiver of deportation. With respect to both questions, the government has taken the same position it ultimately advanced under the amendments made by AEDPA and IIRIRA's transitional provisions.

Thus, on the first question—whether aliens may obtain judicial review to contest the threshold finding of deportability—the government has maintained that the courts of appeals retain jurisdiction to determine their own jurisdiction and to decide constitutional and non-constitutional claims challenging whether the alien "*is* removable" on the basis of a criminal offense enumerated in the criminal bar provision in Section 1252(a)(2)(C) (emphasis added). And, as with the prior amendments, the circuits have agreed that they may review constitutional and non-constitutional claims challenging whether the alien is removable on the basis of an offense enumerated in Section 1252(a)(2)(C). *See, e.g., Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000).

On the second question—the availability of judicial review over challenges to the denial of a waiver of deportation—the courts of appeals are divided. Four circuits, including the court of appeals below, have held that aliens may not challenge the denial of a waiver in the court of appeals by means of a petition for review, but may bring both constitutional and statutory challenges to the denial of a waiver in a Section 2241 habeas action in district court. *See Pet. App. 20a-21a* (opinion below); *Mahadeo v. Reno*, 226 F.3d 3, 13 (1st Cir. 2000); *Calcano-Martinez v. INS*, 2000 WL 1336611 (2d Cir. Sept. 1, 2000); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1137 (9th Cir. 2000).

Three Circuits (the Fifth, Seventh and Eleventh) have accepted the government's position that there is no longer any habeas jurisdiction over final orders and have held that any review that remains for aliens removable on the basis of a criminal conviction enumerated in Section 1252(a)(2)(C) must be sought in the court of appeals by a petition for review. These courts have acknowledged that the permanent rules, like the prior amendments, nowhere mention Section 2241, but have concluded that the language and overall structure of the permanent amendments are sufficient to repeal habeas jurisdiction. *Max-George v. Reno*, 205 F.3d 194, 198 (5th Cir. 2000); *Morales-Ramirez v. Reno*, 209 F.3d 977, 980 (7th Cir. 2000); *Richardson v. Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) (*Richardson II*), *cert. denied*, 120 S.Ct. 1529 (2000). These courts have not, however, squarely ruled on the government's contention that the courts of appeals' petition-for-review jurisdiction is restricted to reviewing substantial constitutional claims challenging the denial of a waiver of deportation.

### *C. Petitioner's Administrative Immigration Proceedings*

Petitioner, Jose Carmelo Rodriguez, has resided in the United States for more than 15 years. He entered the United States on December 20, 1983, as a lawful permanent resident of the United States and has resided continuously and lawfully in the United States since that time. He is married to a United States citizen and the couple have two United States citizen children, aged ten and seven. His parents and his three siblings are also United States citizens. Pet. App. 47-48a.

In February 1993, Petitioner pled guilty in New Jersey state court to two counts of receiving stolen property in the third degree and one count of possession of a controlled, dangerous substance (cocaine) in the third

degree. He was sentenced to four years imprisonment but was released after he served approximately fifteen months. In March 1994, he pled guilty in Ohio state court to receiving stolen property and received a six-month sentence. In November 1995, Petitioner pled guilty in New Jersey state court to one count of receiving stolen property and served approximately two years of a five year sentence. Pet. App. 7a.

Based on his criminal convictions, the Immigration and Naturalization Service (INS) instituted removal proceedings against Petitioner in July 1997. Petitioner conceded that his criminal convictions rendered him deportable under 8 U.S.C. 1227(a)(2)(A)(ii) (two crimes of moral turpitude), 1227(a)(2)(A)(iii) (aggravated felony), and 1227(a)(2)(B)(i) (controlled substance offense), but sought to apply for a waiver of deportation under, *inter alia*, former 8 U.S.C. 1182(c), INA § 212(c). That provision authorized the Attorney General (or her delegates, immigration judges and the BIA) to waive deportation for longtime lawful permanent residents who satisfied the statutory eligibility criteria. According to Department of Justice Statistics, more than one-half of all applications for Section 212(c) relief were granted between 1989-1994. *See Goncalves*, *supra*, 144 F.3d at 128 (citing DOJ statistics).[8]

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[8] Prior to 1996, at the time Petitioner pled guilty to his criminal convictions, lawful permanent residents were statutorily eligible to apply for a Section 212(c) waiver if they had a lawful unrelinquished domicile in this country for seven years, and, if convicted of an "aggravated felony" (as defined in the INA, 8 U.S.C. 1101(a)(43) (1994)), had not served a term of imprisonment for that conviction of five years or longer. 8 U.S.C. 1182(c). *See Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976). The request for Section 212(c) relief was adjudicated by an immigration judge as part of the deportation process and an order of deportation was not entered until the Section 212(c) application was adjudicated.

In December 1997, an immigration judge determined that Petitioner was statutorily ineligible for Section 212(c) relief, denied the request for a waiver as a matter of law, and ordered him removed from the United States. Pet. App. 37a. The BIA affirmed on December 29, 1998, agreeing that Petitioner was statutorily ineligible to apply for Section 212(c) relief from deportation in light of the amendments made to the INA's waiver provisions by IIRIRA. Pet. App. 40a.

The BIA's decision was based on IIRIRA § 304(b), 110 Stat. 3009-597, one of the permanent IIRIRA substantive amendments. Pet. App. 42a. In light of IIRIRA § 304(b), which repealed 8 U.S.C. 1182(c), INA § 212(c), as of April 1, 1997 (IIRIRA's general effective date), the BIA reasoned that a waiver under former Section 212(c) was "not a form of relief that is available" to aliens, like Petitioner, whose immigration proceedings commenced on or after April 1, 1997. The BIA rejected Petitioner's contention that the repeal of the former Section 212(c) waiver provision did not apply retroactively to cases where, as here, the alien had been statutorily eligible to apply for Section 212(c) relief and had pled guilty to the criminal offense triggering deportation prior to passage of the 1996 amendments. (The Second Circuit is the only court of appeals that has squarely addressed the merits of Petitioner's statutory retroactivity claim regarding his eligibility for a Section 212(c) waiver. It rejected the BIA's interpretation and held that aliens with pre-AEDPA/IIRIRA pleas remain eligible to apply for Section 212(c) relief. *See St. Cyr v. INS*, 2000 WL 1234850, *11, *12 (2d Cir. Sept. 1, 2000)).[9]

[9] The Second Circuit reasoned, *inter alia*, that aliens may have chosen to accept a plea (often on the advice of defense counsel) on the understanding that it would preserve their eligibility for Section 212(c) relief and that to deny them the opportunity to apply for relief

### *D. Decision of the Court of Appeals*

Petitioner sought judicial review of the BIA's ruling that he is statutorily ineligible to apply for Section 212(c) relief on two main grounds. The first is the statutory claim accepted by the Second Circuit in *St. Cyr*: that the repeal of the INA's former Section 212(c) provision does not apply retroactively to cases where the alien entered into a pre-AEDPA/IIRIRA plea agreement that left him statutorily eligible to apply for Section 212(c) relief at that time. The second is a constitutional claim: that the retroactive repeal of Section 212(c) relief for aliens with pre-Act pleas would be arbitrary and irrational in violation of due process and equal protection. Because of the jurisdictional controversy surrounding the 1996 amendments, Petitioner filed both a petition for review directly in the Third Circuit (which is the subject of this petition) and a district court habeas corpus action (which remains pending on appeal before the Third Circuit).

The court of appeals issued its decision on March 9, 2000.[10] The court of appeals recognized that Petitioner was challenging only whether he was improperly denied the right to apply for a waiver of deportation under former Section 212(c) and was not contesting the BIA's threshold determination that he was deportable on the

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under these circumstances would have an impermissible retroactive effect. *St. Cyr*, 2000 WL 1234850, at *12.

Several circuits have ruled for aliens on similar retroactivity grounds in cases falling under AEDPA's restrictions on the availability of Section 212(c) waivers. *See Magana-Pizano v. INS*, 200 F.3d 603, 611 (9th Cir. 1999); *Tasios v. INS*, 204 F.3d 544, 552 (4th Cir. 2000); *Mattis v. INS*, 212 F.3d 31, 33 (1st Cir. 2000).

[10] The court of appeals consolidated Petitioner's case with two other cases (*Liang v. INS* and *Cinquemani v. INS*). The aliens in those two cases were not represented by counsel for Petitioner and have apparently not sought review in this Court.

basis of one of the criminal offenses enumerated in the jurisdictional bar in 8 U.S.C. 1252(a)(2)(C). In light of the jurisdictional bar in Section 1252(a)(2)(C), the court of appeals held that it could not entertain Petitioner's constitutional or statutory claims challenging the denial of a Section 212(c) waiver because Section 1252(a)(2)(C) repealed the court's petition-for-review jurisdiction over such challenges. The court rejected the government's argument that it should carve out an exception for substantial constitutional claims. The court stated that it was unnecessary for it to create exceptions to the jurisdictional bar for constitutional claims (or any other type of claim) because the permanent rules left open an alternative avenue of review for constitutional and statutory claims challenging the denial of a waiver, namely a district court habeas action under Section 2241. By finding that habeas jurisdiction existed, the court avoided the "serious constitutional problems" that would have been triggered by a complete preclusion of review over Petitioner's constitutional or statutory claims. Pet. App. 28a.

The court of appeals' conclusion that Section 2241 habeas review remained available was based on its prior decision in *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), which interpreted the jurisdictional provisions of AEDPA and IIRIRA's transitional rules. The court of appeals noted that, under *Sandoval*, Section 2241 could only be repealed by an express directive. Accordingly, the court stated that the precise question in this case was whether the permanent rules are more specific with respect to Section 2241 than the transitional rules:

> The difficulty with the government's effort to convince us that the language . . . of any of the permanent rules requires a different result than that reached in *Sandoval* is that no language in the permanent rules fills the gap we found in *Sandoval*.

> None of the provisions, including INA § 242(b)(9) [8 U.S.C. 1252(b)(9)], expressly refers to habeas jurisdiction or to 28 U.S.C. § 2241. None expressly revokes habeas jurisdiction.

Pet. App. 20a.

The court of appeals thus concluded that Section 2241 jurisdiction remained available and instructed Petitioner to pursue his claims in his habeas action, which was then pending in the district court. On June 9, 2000, the court of appeals denied the government's petition for rehearing and rehearing *en banc*.

In light of the court of appeals' decision, the district court ruled that it had Section 2241 habeas jurisdiction over Petitioner's constitutional and statutory claims but ruled for the government on the merits. Pet. App. 57a. Petitioner has appealed that merits ruling, and the case is currently before the Third Circuit awaiting a briefing schedule. *Rodriguez v. Reno*, No. 00-2225 (3d Cir.).

## REASONS FOR GRANTING THE WRIT

Petitioner's jurisdictional position is that his constitutional and statutory claims challenging the BIA's finding that he is statutorily ineligible to apply for a Section 212(c) waiver of deportation must be available in *some* court—either a district court habeas action or a petition for review in the court of appeals. Because the court of appeals in this case held that Petitioner's constitutional and statutory claims were reviewable in a district court habeas action under 28 U.S.C. 2241, Petitioner does not object to the court's conclusion that it lacked jurisdiction to review his claims by a petition for review. Petitioner recognizes, however, that the circuits are currently divided on the availability of habeas review over challenges to the denial of a waiver of deporta-

tion,[11] and that this conflict may give the Court reason to grant review on this jurisdictional issue. If the Court does conclude that review is warranted, Petitioner respectfully urges the Court to grant the instant petition for the following reasons.

First, and most importantly, if the Court decides to consider the jurisdictional issue, it should grant review in both a petition for review case and a case arising from a district court habeas action, thereby ensuring that it has a comprehensive vehicle to address the issues in this case. As the courts of appeals have properly recognized, including the Third Circuit in this case, the interpretation and constitutionality of the IIRIRA amendments depend upon the extent to which *some* forum remains available to review claims such as Petitioner's. *See* Pet. App. 10a (opinion below) ("determination of our jurisdiction over the petitions for review is inextricably intertwined with the question whether the district courts have continued habeas jurisdiction"); *Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000); *Calcano-Martinez v. INS*, 2000 WL 1336611 (2d Cir. Sept. 1, 2000). Moreover, the instant petition for review case is an especially appropriate vehicle because Mr. Rodriguez filed both a petition for review and a district court habeas action, and the court of appeals addressed both avenues of review in a comprehensive opinion.

Second, Petitioner is challenging the denial of a waiver of deportation, and not the BIA's threshold finding that he is deportable. As noted, that distinction is

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[11] *Compare* Pet. App. 1a (opinion below); *Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000); *Calcano-Martinez v. INS*, 2000 WL 1336611 (2d Cir. Sept. 1, 2000); *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000); *with Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999); *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000); *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000).

fundamental because there is no disagreement among the circuits on the availability of jurisdiction to challenge whether the BIA properly found an alien deportable on the basis of one of the criminal offenses triggering IIRIRA's jurisdictional bar. The circuits have overwhelmingly agreed (as does the government) that such a challenge may be brought in the court of appeals and is not limited to correcting only constitutional errors. The jurisdictional conflict has arisen solely with regard to the proper forum and scope of review over challenges to the denial of a *waiver of deportation* once the alien has been determined to be deportable.

Third, and critically, Petitioner has sought review of both constitutional and statutory claims. Accordingly, this case presents both the issue of the proper forum for review (district court or court of appeals), as well as the recurring issue regarding the scope of review for aliens with criminal convictions, and specifically, whether aliens with certain criminal convictions may be limited to raising only "substantial constitutional" claims challenging the denial of a waiver of deportation. Moreover, the particular statutory claim raised by Petitioner in this case, whether the permanent IIRIRA amendments *retroactively* repealed eligibility for Section 212(c) waivers of deportation, is the statutory issue that has given rise to the most jurisdictional confusion.

## CONCLUSION

For the foregoing reasons, the Court should grant this petition if it grants review in a habeas corpus case to resolve the jurisdictional issues raised in this case.

Respectfully Submitted,

Kerry W. Bretz
Jules E. Coven
Alan Michael Strauss
BRETZ & COVEN
305 Broadway
Suite 100
New York, New York 10007
(212) 267-2555

Lucas Guttentag
*Counsel of Record*
Lee Gelernt
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
Immigrants' Rights Project
125 Broad Street
New York, New York 10004
(212) 549-2621